91-1386

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

JONATHAN LOWRY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

I. ***Whether due process is accorded an accused when the Court refuses to dismiss an indictment charging one with conducting a Continuing Criminal Enterprise (CCE) in violation of Title 21 U.S.C., §848, when the indictment fails to identify the five or more persons relied on by the grand jury in returning the indictment.***

II. ***Is due process violated when the Court denies the accused's Motion by which it sought to have the Court cure or correct the devastating impact of its chief witness bolstering his own credibility by testimony he had passed a lie detector test?***

III. ***Whether the accused's right of confrontation was violated by the admission of certain egregious hearsay proof that was attributed by the case-agent to a non-testifying declarant-informant.***

IV. ***Was due process rendered impossible when the government, in spite of the bar created by Rule 404(a), was allowed to question a defendant (who was also the brother of this petitioner) who was testifying in his own defense, as to whether his brother had a***

reputation as being a drug dealer?

V. *Whether due process was accommodated when the trial court refused to instruct the jurors that in order to convict on the Continuing Criminal Enterprise Charge (21 U.S.C., §848) they were required to reach an unanimous agreement on the three (3) acts constituting the "continuing series" of "felony drug" offenses that were committed by the defendant.*

VI. *Whether due process was denied when the Court refused to instruct the jurors they had to unanimously agree on the three (3) acts required for a continuing series of "felony drug" offenses where the evidence was insufficient to prove that all of those submitted to the jury were proved.*

VII. *Whether a verdict finding one guilty of CCE can be squared with constitutional and statutory requirements that jurors must agree as to the five or more persons, and as to acts making for the "continuing series" of felony drug violations required.*

VIII. *Can a verdict finding the accused guilty of a CCE charge survive constitutional scrutiny where no*

reasonable juror could have found the proof established that the petitioner, either, (A) committed the required "continuing series" of felony drug violations, and (B) did so "in concert" with five other people as mandated by Title 21 U.S.C., §848?

IX. *Where in an indictment charging Title 21 drug offenses of CCE (§848) and Conspiracy (§846), whether the Sentencing Guidelines apply cannot be determined solely on the basis of the verdict finding the accused guilty as charged, and even if the Guidelines are applicable, the determination made must conform to fundamental criteria.*

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To The Honorable, The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

The Petitioner, Jonathan Lowry, respectfully prays that a Writ of Certiorari issue to review the

judgment of the Fourth Circuit Court of Appeals, which judgment became final on November 27, 1991 (Appendix "A") when a Petition for Rehearing En Banc (Appendix "B") was denied.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fourth Circuit is set forth at Appendix "C" in the Appendix to this Petition. The Opinion by the trial Court denying the Motion For Judgment Of Acquittal is designated Appendix "D".

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the U.S. Court of Appeals was entered on October 25, 1991. The Order denying a Petition for Rehearing was entered on November 27, 1991. The jurisdiction of this Court is invoked under Title 28 U.S.C.

§1254 (1).

Jurisdiction is also being invoked under favor of **Rule 10.1(a), Rules of the Supreme Court**.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS WHICH THE CASE INVOLVES:

1. Sixth Amendment, United States Constitution;
2. 18 U.S.C., §2;
3. 18 U.S.C., §2113 [a] and [d] [1982];
4. 21 U.S.C., §841;
5. 21 U.S.C., §846;
6. 21 U.S.C., §848;
7. Rule 29 (C), Federal Rules of Criminal Procedure;
6. Rule 401, Federal Rules of Evidence;

STATEMENT OF THE CASE

Jonathan Lowry was found guilty by a jury, as "charged by the Judge" on Count I, CCE (21 U.S.C., §848);

Count II, Conspiracy (id., 846); Count III, Distribution of Cocaine (id., 841); Count IV, Interstate Trafficking (18 U.S.C., §1952) and Money Laundering (id., §1956). He was sentenced under the Guidelines on Counts I and II to a life sentence. His sentences on the non-guideline counts were made concurrent with the life sentence. By this Petition, Jonathan Lowry seeks a review of all aspects of his convictions.

STATEMENT OF THE FACTS[1]

The significant evidence presented against the petitioner, Jonathan Lowry (all of which was

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[1] References to **J.A.** are to the Joint Appendix filed in the Appeals Court. **TR** refers to the Transcript and the reference **Appendix " ", p. ___**, is to the Appendix to this Petition.

literally uncorroborated), was supplied by various individuals who sought to curry the favor of the government by supplying after-the-fact information that related to events that assertedly had occurred years before. Each of these individuals had already been convicted of serious drug offenses, or a serious homicide offense, before information was actually purchased from them in exchange for various considerations. The only exception applies to Renice Locklear, the wife of the government's chief informer. She forthrightly admitted being under intense pressure (exerted by the government and her husband) to implicate Jonathan Lowry in their wrongdoings. (**J.A., 615-616.**) While Renice Locklear was not

prosecuted, she nonetheless brazenly admitted to making "six or seven" substantial purchases of drugs in Florida. These transactions, according to her, "would usually be around a couple hundred thousand dollars or more" (**J.A., 610**). Equally significant here, these drugs were delivered to her husband, Brady Locklear, who was ultimately prosecuted and convicted in all three jurisdictions of the State of North Carolina.

Brady Locklear's testimony varied as to whether or not he shared (**J.A., p. 497, 558, 561 & 564**) the drugs he obtained from Ingrid[2] with Jonathan Lowry. Most significant here Locklear

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[2] The "Ingrid" referred to here was acquitted despite Brady Locklear's testimony in United States v. Ingrid Randall. (J.A., pp. 550-552).

admitted that whatever relationship he had with Jonathan Lowry it terminated in March, 1986 (**J.A., p. 550**). On this point, he never wavered, not even slightly. (**See, e.g., 594**). Thus, his testimony that he received between fifty (50) and seventy-five kilos (75) from Ingrid that were shared with Jonathan Lowry (**J.A., p. 550**), which figure did not include all of the kilos he had gotten from Ingrid) (**J.A., pp. 550-551**), becomes even more farfetched.

Despite cogent facts to the contrary, it could not be clearer that the Court fully credited the probation officer's reliance on Brady Locklear's naked estimate that he had gotten "sixty to seventy-five kilos" from Ingrid that were shared with Lowry

(id., 504). See, J.A., p. 2028.

The other critical witness was Pedro Fominaya, a self-admitted "dope fiend" (J.A., p. 882), and a multi-kilo broker of drugs. It was Fominaya's testimony alone that placed Jonathan Lowry under the Sentencing Guidelines. Fominaya's testimony was that he had a conversation in December, 1987 with Jonathan Lowry about the purchase of drugs.

Despite Fominaya's testimony that in the wake of this asserted conversation he made the delivery to Donald Lowry and was, in fact, paid for it (J.A., pp. 719-720), Donald Lowry was acquitted. This acquittal included, as well, Fominaya's testimony that there were at least "ten" drug transactions he had with

Donald Lowry (**J.A., p. 698**).

It is equally significant that Hardy Ray Wynn and Bonita Lowry were likewise acquitted of charges made against them solely on the basis of evidence supplied by Fominaya. Fominaya not only testified he delivered drugs to Hardy Wynn on the very first occasion he saw him (**J.A., p. 648**), he also testified that when Jonathan Lowry would take delivery himself, there would always be someone with him, and that "most of the time he [i.e., Lowry] would be accompanied by Hardy Ray Wynn" (**J.A., p. 668**).

Additionally, the proof shows it to be more than mere exaggeration that Locklear could have gotten "forty kilos of cocaine and six to seven hundred pounds" from Fominaya in less

than 3 months, i.e., before March, 1986, when he says he terminated whatever relationship he had with Jonathan Lowry (id., 345-346 & 350).

Next, the testimony conclusively shows the very first transaction Brady Locklear could have possibly had with Pedro Fominaya (if indeed he had any) occurred in very late 1985 or 1986 (id., 489). This 1986 thesis is validated by Renice Locklear's testimony that she first met Pedro Fominaya in 1986 when the Jonathan Lowry and Brady Locklear couples vacationed in Florida (id., p. 609). She was equally positive that it was after that trip when she "went ... [with her husband] to Florida ... and her husband picked up some drugs" from Fominaya (ibid).

ARGUMENTS RELIED ON FOR ALLOWANCE OF WRIT

At the risk of belaboring the obvious, our hope is that this Court will indeed realize that the Opinion rendered by the Fourth Circuit on the unanimity issues (**Opinion, Appendix "C", p. A 9**) cannot be reconciled with Opinions rendered by the Ninth Circuit in **United States v. Jerome, 942 F.2d 1328, 1330-1331 (9th Cir. 1991)** and by the Third Circuit in **United States v. Echeverri, 854 F.2d 638 (3d Cir. 1988)**. Clearly this makes for the type of conflict that falls within the ambit of Rule 10.1(a), of the **Supreme Court Rules**.[3] As to the **Jerome** case,

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[3] Here we are aided by the Fourth Circuit's conclusion that its Opinion in this case is at least in conflict with the Third Circuit's Opinion in **United States v. Echeverri**. See Opinion, Appendix "C", at p. A 31.

the Fourth Circuit's ostrich-like response was to simply ignore their existence. For here, the Court despite having been advised of the first **Jerome** case nonetheless declared in its original Opinion that only the Third Circuit (in **United States v. Echeverri**) had adopted our unanimity thesis. Thus the Court chose to simply remit us to the almost impossible task of getting a review from this Court.

For starters the facts in our case are stronger than **Jerome**, which was decided on a plain error theory. Here, unlike the situation in **Jerome**, in addition to attacking the indictment for failing to enumerate the five or more people or the predicate acts relied on, our requested unanimity instructions were

rejected. Cf., **Jerome, 742 F.2d, at 1331.**

Also, it should be noted that the Appeals Court's inclusion of the alleged distribution to Carson Manor (as charged in Count III), as one of the acts required to make for the "series" (**Opinion, at p. A 33**) cannot be squared with **United States v. Townley, 942 F.2d 1324 (9th Cir. 1991).**

Again, our case is even stronger than **Townley**. For in **Townley** the Court held that inasmuch as the fingerprints on the wrapping there involved "showed only that Townley had some prior contact" with the wrapping did not justify the inference he was in possession of the contents. In our case, the inference being asserted is

that the prints not only proved Jonathan Lowry had possession, but that he actually distributed the contents to Carson Maynor in whose home the bag was found.

Next, it should be noted the Fourth Circuit was quite willing to concede Jonathan Lowry did not manage or supervise some of the people named by the government and the jury (**Opinion, Appendix "C", p. A 38**). And, seemingly the Court was quite willing to inferentially hold that "but for" the three (3) offenses it specifically isolated, they would have agreed there was a flaw as to the lack of a unanimity instruction on the "continuing series" element (**id., p. A 33 to A 34**). Even this is not all. It is at once apparent, as counsel

opposite will surely recognize, that one of the offenses isolated by the Court and asserted as proof the jurors were unanimous on at least three (3) felony drug offenses was not a "felony drug offense" (ibid). Indeed, it is beyond dispute that the Interstate Travel charge (made in Count IV) was an asserted violation of Title 18. And, Title 18 offenses simply do not fall within the ambit of 21 U.S.C., §848 (c)(1) & (2).

Additionally, the Fourth Circuit further held that "the jury also unanimously found [as one of the offenses required] that Jonathan Lowry committed another offense after November 1, 1987" (**Opinion, Appendix "C", p. A 33**). This non-specific reference was to a conversation

supposedly had with Pedro Fominaya and was related to drugs supposedly delivered to and paid for by Donald Lowry. Obviously the conclusion that this asserted transaction was one of the bases for the jury's verdict cannot survive the fact of the acquittals given in favor of Hardy Wynn and Donald Lowry. (**Ibid.**)

Also, the fact that one is credited with placing an order with a supplier, as the Court says was done here (ibid), is not standing alone a Title 21 offense. Surely counsel opposite will address this point.

I. *Due Process Was Denied When The Court Refused To Dismiss The Indictment Based On Its Failure To Identify The Five, Or More, Essential Persons The Grand Jury Relied On In Returning The CCE Indictment Against Jonathan Lowry.*

To qualify one for a CCE conviction a "series" of three (3) violations of the federal narcotics laws must have been committed; and these violations must have been performed "in concert" with at least five (5) other people. On the other hand, it is beyond dispute that the accused not only is entitled to be specifically charged with such violations by the grand jury, **Hamling v. United States, 418 U.S. 87, 117 (1974)**, but also to the unanimous concurrence of the jurors regarding

their selection of the "series" of crimes relied on.

These various contentions, which are an analogue to those summarily rejected in the Court's denial of our Motion to Dismiss, rely on the fact that it is indeed a firmly rooted constitutional principle that an accused is entitled to specific notice of the charges. See e.g., **Watson v. Jago, 588 F.2d 330 (6th Cir. 1977).**

Our point here is well made when one considers counsel opposite's response to our specific request for a description of the predicate offenses relied on. (See Counsel Opposite's letter, dated October 18, 1989. [**J.A., p. 41**] referred to in the **Opinion, Appendix "C", at pp. A 21 to A 22.**)

Now admittedly the alleged

distributions to David Mercer were charged in overt act nos. 4 and 5 of the conspiracy count. The distribution to Carson Maynor was alleged in the indictment as overt act no. 6. It was also referred to as Count III of the indictment.

By a parity of reasoning, the same points can be made with reference to the five (5) person requirement for a CCE conviction. And, while the Court disregarded our contention that the indictment did not properly charge a CCE violation because it failed to identify the five (5) persons the Grand Jury relied on in returning the indictment, the point can still be made that simply tracking the statute, as was done here, does not satisfy due process requirements.

This point is magnified by the fact that despite our specific references to Rule 7 (C) (1), Federal Rules of Criminal Procedure, it seems clear enough the Court, in denying our Motion (see Order, J.A., p. 51), arguably refused to reckon with the lack of any incorporation language in the CCE Count. As to this cogent point see **United States v. Apodaca, 843 F.2d 421, 427 and 428 (10th Cir. 1988)** and **United States v. Ricks, 776 F.2d 455, 463 and n. 13 (4th Cir. 1985)**. Also see **United States v. Staggs, 881 F.2d 1527, 1536-1546 (10th Cir. 1989)**. Cf. Opinion, Appendix "C", at pp. A 21 to A 22.

II. *Due Process Is Violated When A Court Refuses To Strike, Or Otherwise Protect The Accused From, Testimony That Was Willfully And Cleverly*

Volunteered By An Essential Government Witness That He Had Passed A Lie Detector Test.

The admissibility of the evidence showing Brady Locklear passed a lie detector test cannot be defended on any known theory. Indeed the Court, reversing the position expressed by him to the jury, has made the categorical determination that "Brady Locklear's testimony that he had passed a lie detector test was not in response to any question before the witness." Order, **J.A., p. 187 n.2.**

Since Locklear's testimony was definitely not peripheral to the issues in the trial, there is really no way it can be held that the resulting flaw had no effect on the jury's verdict. Yet, this error was said to be harmless. **Opinion,**

Appendix "C", pp. A 24 to A 25.

III. *Petitioner's Right Of Confrontation Was Violated By The Admission Of Certain Prejudicial Hearsay That Was Attributed By The Case-Agent To A Non-Testifying Informant-Declarant.*

The only evidence in this case offered to establish certain overt acts, that were specifically alleged to have been committed in furtherance of the charged conspiracy, was the testimony by Randy Myers, an SBI (State Bureau of Investigations) agent. He was allowed to testify that "two controlled buys were made [from James Maynor, an alleged conspirator] through a confidential informant" (**J.A., 1501-1503**). Additionally, this officer testified as to the substance of several phone calls this unknown

person supposedly had with Maynor (id., 1502). Further, the jury was assured that as a result of these transactions James Fuller Locklear and James Maynor were arrested and convicted (id., 1504-1505).

To begin with it could not be clearer that the agent's testimony that drug sales were consummated by his unnamed informant with Fuller Locklear and James Maynor is so obviously based on hearsay as to actually require any contrary argument to bear the label outlandish, ridiculous or specious. Yet, these asserted transactions were offered as substantive proof of the offenses said to be part of the series of felony drug transactions that made for the CCE accusation.

Since Maynor and Fuller Locklear were said (by the government [id., 1823]) to have been supervisees of Jonathan Lowry, there is simply no way to gauge the harm generated by this false proof.

IV. *Due Process Is Denied Where It Is Apparent From The Context In Which A Particular Question Was Asked And The Specific Objections Taken That The Intended Purpose Of The Question Was To Place The Accused's Character In Issue*.

Less there be some misunderstanding as to precisely what facts background the serious contentions here being made, the following segment of this Record cogently demonstrates the efficacy of our position:

> Q. Your brother had a reputation of being a

drug dealer, didn't he?

MR. WILLIS: Objection.

THE COURT: Overruled.

A. Repeat the question.

Q. Did your brother have a reputation for being a drug dealer?

A. I have heard it, yes.

MR. WILLIS: Objection.

THE COURT: Overruled.

Tr., pp. 1644-1645. (Emphasis supplied.)

Further, it is significant that the Government, in defense of its role in this debacle, has brazenly argued "the evidence concerning defendant's reputation was elicited from a co-defendant testifying on his own behalf to show the defendant's knowledge and participation in the conspiracy." Government's Response to

Defendant Lowry's Motion for a New Trial, **J.A., pp. 158-159.**

Here the District Court, without telling us how he did it, somehow hurdled, not only his original ruling made within earshot of the jury, but Rules 105 and 403, as well. This was done by ruling that this evidence was admissible "to show defendant Donald Lowry's knowledge and participation in the conspiracy" (Order, **J.A., at p. 186**). (Emphasis supplied.) Thus, we have the Government saying this evidence was intentionally offered, and was properly admitted against Donald Lowry and Jonathan Lowry because it showed Donald Lowry's "participation in the [charged] conspiracy." And, we have the Fourth Circuit saying it was within the trial

Court's discretion to admit this proof, doubtless for what it was worth (**Opinion, at pp. A 29 - A 30**).

So postured, it is significant here that no one bothered to tell the jury the evidence was so restricted.

V. *Due Process Was Denied When The Trial Court Refused To Instruct The Jury That They Were Required To Reach An Unanimous Agreement On The Three (3) Acts Constituting The "Continuing Series" Of "Felony Drug" Offenses Committed By The Defendant, In Order To Convict On The CCE Charge.*

To prove one guilty of violating 21 U.S.C. §848 (the CCE statute) the proof must establish, inter alia, a "continuing series" of violations of the federal narcotics law. Further, this activity must have been

undertaken in concert with five or more persons over whom the defendant acted as the organizer, supervisor or manager in the charged enterprise.

These tenets make for the requirement that the jury must unanimously agree on the three predicate acts relied on to satisfy this numerical requirement. See **United States v. Echeverri, 854 F.2d 638 (3d Cir 1988)**. This follows because the unanimity required by the Sixth Amendment's right to a jury trial and **Rule 31, Federal Rules of Criminal Procedure**, makes it clear enough that unanimity certainly means far more "than a conclusory agreement that the defendant has violated the statute in question" and that there is a meaningful "requirement of substantial

agreement as to the [principle] factual elements underlying a specific offense." United States v. Ferris, 719 F.2d 1405, 1407 (9th Cir. 1989). United States v. North, 910 F.2d 843, 873-878 (D.C. Cir. 1990).

Postured by the above analysis, the question then is, what is it about the verdict that shows what acts were indeed relied on by the jury and that they were unanimous on these selections?

VI. *Where The Jury Is Submitted More Than The Required Felony Drug Offenses Needed To Satisfy The "Continuing Series" Element Of The "CCE" Offense, The Evidence Must Be Sufficient To Prove All Of Them. And Where (As Here) It Cannot Be Reliably Determined Which Offenses The Jury May Have Relied On In Reaching Its Verdict, It Cannot*

Be Said That Due Process Was Accorded The Accused.

In a nutshell, we are contending that due process is violated, where as here, the verdict, finding our Petitioner guilty of CCE, fails to indicate the specific federal drug violations relied on by the jury to satisfy the "continuing series" element required by 848(c)(2). The same is true when there is no way to know if there was the required unanimity on any three of the violations.

Now, a critical aspect of the specific contentions here being made involves crediting the insuperable fact that the proof in the Record is clearly insufficient to support any finding that Jonathan Lowry was guilty

of all of the substantive Felony Drug Offenses listed in the indictment -- some of which were designated as "overt acts" in the conspiracy charge. And, only Count III charged the defendant with a substantive violation of Title 21, U.S.C. (The apparent notions of the Fourth Circuit to the contrary, notwithstanding, the charge made in Count IV of this indictment is a violation of the Interstate Travel Act 18 U.S.C. § 1952. Clearly this is not a felony drug offense within the limiting language of 21 U.S.C. §848 [c][1]).

The effect of this is most obvious. Simply put, there is no way one can be sure which of the possible predicate "felony drug offenses" the jury unanimously agreed the defendant

committed. Nor can there be any assumption that none of the jurors did not rely on a short list (for them) that included one or more of the charges made in the various "overt acts", i.e., Nos. (6) (7) (8) (10) (12) (13) (14) (15) & (18), for which the evidence was clearly insufficient to support findings of guilt beyond a reasonable doubt as argued at the close of all the evidence (**Tr. 1502**). And, how can it be known whether any of the jurors did not rely on Count III, although the proof that offense was committed can hardly pass constitutional muster. See **United States v. Townley**, **supra**. Also see Justice White's dissent from the denial of Certiorari in **McCollock v. United States**, 108 S. Ct. 337 (1987).

VII. *A Verdict Finding One Guilty Of CCE That Cannot Be Squared With The Constitutional And Statutory Requirement That The Jurors Must Unanimously Agree, Both, As To The Five (5) Or More Persons, And As To Acts Making For The "Continuing Series" Of Felony Drug Violations Required Must Be Deemed Invalid.*

By the pretrial Motion the defense had sought to eliminate any possibility that a composite or "patchwork", non-unanimous verdict would result. The Motion also warned the Court of the very real danger that persons not considered by the Grand Jury could possibly be relied on by the petit jury as one or more of those supervised and controlled by the asserted "kingpin". These same points were magnified, not only in counsel's

Rule 29 Motion made at the close of the Government's case (**Tr., pp. 1494-1506**), but in counsel's submitted instructions. These same points are likewise applicable to the asserted drug violations the defendant had to have committed "in concert" with these five (5) or more people in order to violate (if he did) 21 U.S.C. §848.

Here, it is significant that Justice Blackburn, in his concurring opinion, in **McKoy v. North Carolina, 494 U.S 433 (1990)**, underscored that "[i]n federal criminal prosecutions, where a unanimous verdict is required, the Courts of Appeals are in general agreement that 'unanimity'... means more than a conclusory agreement that the defendant violated the statute in question...." Id., 449 n.5. This

cogent analysis when applied to the jury's list[4] of the people it found were "involved" (when it is obvious some of those denominated could not properly have been qualified for inclusion in the numerical requirement) really compels this same conclusion. Cf., **United States v. Echeverry, 719 F.2d 974, 975 (9th Cir. 1983).** Also see **United States v. Beros, 833 F.2d 455, 461 (3d Cir. 1987).**

To be sure, we view the jurors use of the word "involved" as actually masking an apparent inability

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[4] The list being referred to simply read "people involved in the CCE with Jonathan Lowry [were] Ernest Harris; Kelly Ray Chavis, Charles Smith, David Mercer; Brady Locklear; Pedro Fominaya; James Bonk Maynor, Carson Maynor; Bonita Jones Lowry; Renice Locklear." (J.A., p. 1968). (Emphasis supplied.)

to forthrightly state that the jurors were indeed unanimous on at least five (5) of the ten (10) persons denominated by them as having simply been "involved" -- whatever that means. Also, it cannot be overlooked that the word "involved" certainly would include one who was merely a "purchaser" of Drugs. In fact the inclusion of Kelly Chavis as one of those "involved" really makes this point. For the government outrightly concedes he was not supervised (**J.A., p. 1716**). And, even the Court of Appeals inferentially credits our argument as to some of those listed not having been supervised was indeed valid. **Opinion, Appendix "C", p. A 38.**

Our point here is well made when

one realizes that most of the names on the jury's unsolicited list (of the persons said to have been "involved") were not mentioned in either the indictment or even considered by the Grand Jury.

Granted, the District Court has indicated this list was given "in accordance with the Court's instructions" (Order, **J.A., p. 183**). However, the grim fact is there was nothing in the Court's charge that solicited the preparation of any such list. The jurors were only told to "identify" those who participated in the required series of violations "to [them]selves" (**J.A., p. 1934**).

VIII. *Where No Reasonable Juror, After Viewing The Evidence In The Light Most Favorable To The Prosecution, Could Have Found The Proof*

Established That The Petitioner, Either, (A) Committed The Required "Continuing Series" Of Felony Drug Violations, And (B) Did So "In Concert" With Five Other People As Mandated By Title 21 U.S.C., §848, The Verdict Finding The Accused Guilty Of CCE Is Constitutionally Defective.

In dealing specifically with some of the various persons the government has contended were managed or controlled by Jonathan Lowry, one point that must be reckoned with is the fact that merely selling an individual drugs is not sufficient to establish the management role. Given this superable tenet, it seems clear enough that even assuming the jurors credited the testimony of Mercer, Harris, Chavis and Smith; at best, their testimony only showed them to be

purchasers of drugs and not employees or supervisees of Jonathan Lowry.

Also, while the Government contended that Fuller Locklear ("overt act" No. 14), Hanson Hunt (overt act 15) and John Hunt (overt acts 12 & 13) were other than mere purchasers there is absolutely nothing in this Record that connects them to Jonathan Lowry in any respect.

The Record here also fails to establish that Jonathan Lowry "supervised" in any manner, Charles Smith, Renice Locklear, David Mercer, Carson Maynor, Bonita Lowry, Pedro Fominaya, James "Bonk" Maynor, Ernest Ray Harris, Kelly Chavis or Brady Locklear. See **United States v. Douglass, 818 F.2d 1317 (7th Cir. 1987).**

The upshot of the above specific list is that it exposes several serious additional flaws in Jonathan Lowry's conviction. Here, it is clear enough that any relationship between our petitioner and the asserted distributions to John Hunt, David Mercer, James Fuller Locklear, and Ernest Ray Harris could only be that of a seller and a buyer. The same is true of Kelly Chavis and Charles Smith. Further, there was no evidence whatsoever connecting this petitioner in any way to Hanson Hunt. And, Julius Lowry was not shown to have been involved in anything but the purchase of some land, which excludes him as one of those allegedly supervised.

It can hardly be denied that

Jonathan Lowry's print on two bags found locked in a box that contained a bag, or bags, of contraband and non-contraband substances is not proof the bags containing the contraband were distributed by Lowry to Carson as charged in Count III. See **United States v. Townley, 942 F.2d 1324 (9th Cir. 1991).**

So postured, it is illogical to a fault for the Fourth Circuit to have regarded the asserted distribution to Carson Maynor (Count III) as one of the required predicate offenses for the CCE conviction (**Opinion, Appendix "C", p. A 33**). The same fault exists with reference to their determination that this proof also showed a conspiratorial relationship between Jonathan Lowry and Carson Maynor and

as proof Carson Maynor was organized (not supervised) by Lowry. **Id., p. A 38.** See **United States v. Sperling, 560 F.2d 1050, 1055 (2d Cir.1977).**

A further aspect of this analysis focuses on the fact that (1) Renice Locklear, (2) Kelly Chavis, (3) Bonita Lowry, (4) Brady Locklear, (5) Pedro (6) Ernest Fominaya and (7) Charles Smith were, for the first time, contended to have been supervised by Jonathan Lowry during counsel opposite's summations (**J.A., pp. 1823-24**). While Chavis, Bonita Lowry, Brady Locklear and Fominaya were said in the indictment to have been conspirators, they were not denominated by the government in its October 18, 1989 list of persons who it was contending were indeed

supervised by Jonathan Lowry (J.A., p. 41). See United States v. Chavez, 845 F.2d 219, 220-222 (9th Cir. 1988).

In short, one cannot rule out the possibility that Jonathan Lowry was convicted on the basis of less than the unanimous concurrence of all the jurors as to the same five (5) or more persons. Nor, can the possibility be excluded that the jurors convicted Jonathan Lowry because they believed involvement was the critical test. And, just as surely there is no way it can be said that the jurors meant by their use of the word involved the concept of organized the Court of Appeals would impute to them (Opinion, at p. A 38). See Shepard v. United States, 290 U.S. 96, 102-103 (1933), United States v. Hannah, 584 F.2d 27,

32 (3d Cir. 1978) and United States v. Check, 582 F.2d 668, 681 (2d Cir. 1978).

IX. *To The Extent The Guidelines Were Applicable, The Court Erred In Calculating Due Process Requires That The Proper Sentencing Range Must Be Determined In Accordance With Fundamental Criteria.*

The verdicts finding Jonathan Lowry guilty of conspiracy and "CCE" must be considered in the light of the outright acquittals of Donald Lowry, Hardy Wynn and Bonita Lowry and the specific determinations made by the jury that Carson Maynor and Bonita Lowry were not members of any conspiracy that existed after November 1, 1987.

A critical aspect of the

contentions here being made credits the fact that the District Court was not bound by the jury's verdict as to, either, the quantity of contraband indicated in the indictment, or the dates referred to therein as the terminal points of the charged conspiracy (21 U.S.C., §846) and/or the CCE (21 U.S.C., §848). See **United States v. Moreno, 889 F.2d 465 (6th Cir. 1990)** and **United States v. Gibbs, 813 F.2d 596 (3d. Cir. 1987).**

(a) ***Given the jury's rejection of the testimony of Pedro Fominaya with reference to his accusations against Donald Lowry, Hardy Wynn and Bonita Lowry, which rejections can only be viewed as representing a jury determination that certain specific events he testified to did not occur, the collateral estoppel component of the double jeopardy clause bars the Court from relying on the reverse of such rejection in placing this petitioner under the Guidelines in sentencing him.***

In this case, it must be conceded the verdict finding Donald Lowry,

Hardy Wynn and Bonita Lowry not guilty can only be viewed as being a rejection of a crucial segment of the prosecution's theories upon which the Government relied solely on the testimony of Pedro Fominaya. Simply put, those theories were that Donald Lowry and Hardy Wynn were involved in numerous narcotic transactions with Pedro Fominaya. And, that during the course of these particular transactions he (Pedro Fominaya) distributed to them for Jonathan Lowry literally hundreds of kilos of cocaine. See, **J.A., pp. 649, 653-654, 662, 685, 691, 698-700, 718-721, 873, 875-882.**

Equally apparent is the fact that the jury likewise rejected Fominaya's testimony in which he claimed to have

talked with Bonita Lowry (as charged in Count VI). This follows because: if the jury had believed Pedro Fominaya's version of the conversation, not only would they have convicted Bonita Lowry on Count VI, Donald Lowry and Hardy Wynn would have been convicted of conspiracy -- the only charge made against them.

The above scenario thus provides formidable support for our contention that the Government and the trial court were estopped, by the verdicts in this case, from contending and finding that the charged conspiracy and the CCE, if indeed they ever existed, extended past November 1, 1987. Further, it seems clear the Court was likewise collaterally estopped from accepting Pedro

Fominaya's testimony as the sole predicate for the finding that our petitioner was indeed properly held accountable for the more than 150 kilos of cocaine Fominaya says he supplied Jonathan Lowry through Donald Lowry and Hardy Wynn (both of whom were acquitted).

Clearly then, the trial Court's acceptance of Pedro Fominaya's testimony, both, to extend the CCE and the conspiracy beyond November 1, 1987, and in calibrating the quantities involved, with reference to the Guidelines, is logically and legally inconsistent with the verdicts finding Hardy Wynn, Donald Lowry and Bonita Lowry not guilty. And, it is inconsistent with the finding that Bonita Lowry and Carson Maynor were

not involved in any conspiracy that existed after November 1, 1987. (J.A., p. 1967.) This rationale should also be applied full strength to the asserted January, 1988 transaction (id., 717-721), which was the only event relied on to qualify Jonathan Lowry for the Guidelines.

(b) ***Assuming the defendant did engage in a Continuing Criminal Enterprise, still the evidence was insufficient to show this enterprise existed after November 1, 1987.***

Here we start with the contention that the significance of the terminal date of the CCE in this case is not limited to whether the Guidelines even apply. The date is significant for the further reason that there are ex post facto (Article 1, §9 United States Constitution) ramifications here involved.

Here it is a given that Jonathan Lowry could only be sentenced under the Guidelines if indeed the charged CCE was in existence after November 1, 1987 and he was its "Kingpin". On this point, the fact remains none of the acts mentioned anywhere in the indictment that could possibly be relied on to provide one of the required acts to make for the continuing "series," was shown to have occurred after November 1, 1987. See **United States v. Head,**[5] **641 F.2d 174 (4th Cir. 1931).**

Given then the acquittals rendered in favor of Donald Lowry and

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[5] In Head, the Fourth Circuit actually ruled that "in order to avoid the five year statute of limitations for conspiracy, [the government] must prove an overt act in furtherance of the conspiracy committed within the limitation period." Id., 177.

Hardy Wynn, the jury's exclusion of Bonita Lowry and Carson Maynor and the lack of proof as to anyone else who could have possibly "conspired" with Lowry (after November 1, 1987), the trial Court could not simply assume an inconsistent verdict and regard the situation to be controlled by **United States v. Powell, 469 U.S. 67 (1984).** See **United States v. Valasquez, 885 F.2d 1076, 1090-1091 and n. 13 (3d Cir. 1989).**

Thus, the verdict finding Jonathan Lowry was a conspirator after November 1, 1987 can only be explained on the theory that Jonathan Lowry's asserted conversation with Pedro Fominaya was treated by the jury as satisfying the agreement element of a new conspiracy, one that was different

from the one charged in this indictment. At most any such conversation, between Jonathan Lowry and Pedro Fominaya, could only translate into a showing that Jonathan Lowry was trying to be a customer in a drug transaction, not Fominaya's partner in crime. See **United States v. Jerome, 942 F.2d 1328 (9th Cir. 1991).**

So postured, it is worth suggesting that the points contended for above are truly well made by the fact that the acquittals referred to above "represent a jury determination" [6] that Pedro Fominaya did not deliver to Donald Lowry and Hardy Wynn any drugs whatsoever. Thus, the absence of any

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[6] See, Dowling v. United States, 110 S. Ct. 668 (1990).

other possible basis for their verdict requires the conclusion that the trial court was foreclosed from accepting his testimony as the sole basis for the foisting of the Guidelines on Jonathan Lowry or in fixing the quantity of drugs involved.

(c) ***The Court's Utilization Of The Guidelines In Sentencing This Defendant Clearly Violated Due Process Since The Proof Failed To Establish That Any Significant Segment Of The Charged Offenses (i.e., Any "Overt Act" In Furtherance Of Charged Conspiracy, Or Any Of The Predicate Offenses Required For A CCE Conviction) Occurred After November 1, 1987.***

The defendant disputed the "Presentence Report's" characterization of the offense for which he was convicted, as having occurred between January 1, 1981 "through January, 1990" and, as being an offense that involved "275 kilograms of cocaine and 7,500 pounds of marijuana." One of

the bases for the dispute was the lack of proof showing transactions, possessions, distributions (and the like) of contraband by anyone occurred after November 1, 1987. See Guideline §2D1.4, Comment (N.1) and **United States v. North, 900 F.2d 131, 133 (8th Cir. 1990).**

(d) ***Assuming the Guidelines properly applied to the sentence imposed on this petitioner, the ending dates indicated in the Indictment for the CCE and the conspiracy counts are not dispositive as to which version of the Guideline applied.***

The plot here becomes even more complicated when it is realized that even if the Guidelines did apply to Jonathan Lowry's conspiracy and CCE convictions, we cannot rely on the dates in the indictment as being dispositive of all of the issues as to the applicable version of the Guidelines that control.

Here, we are aided in the determination as to which of the various versions of Guideline 2D1.1 applies by a very specific statement in the Application Notes to §2D1.5. There the commission, albeit in another context, indicated that the date "the last overt act" was committed in furtherance of a CCE is most significant in the application of the Guidelines. See U.S.C., §2D1.5, Application Note No. 3, p. 80. This being so, the decision as to whether the Guidelines even apply, and (if so) which version is applicable, would depend on the date when the last "overt act" was committed.

In all this, it seems clearly to be the law that the quality of the evidence relied on must have a

"sufficient indicia of reliability to support its probable accuracy," Guideline, §6A1.3 (A). Equally important is the further fact that the fixing of the date of the last "overt act" is likewise crucial and essential to any resulting query as to whether the Court's finding, in this regard, violated the ex post facto concept of the Constitution (Article 1, §9, Cl. 3). Such a violation would result if the Court applied a Guideline as amended after the last date of the "overt act" committed in furtherance of the charged offense. In our judgment, the last "overt act" would be the last offense committed in the required "Continuing Series".

In assaying the determinations apparently made by the trial Judge,

there are certain facts that must be reckoned with. One, there was no evidence, direct or circumstantial, that established the commission (after November 1, 1987) of any act that could possibly be regarded as satisfying the "Continuing Series" requirement. Now it may very well be argued that Pedro Fominaya did testify that (as charged in the indictment) Jonathan Lowry propositioned him to get with his brother (i.e., Jonathan Lowry's brother) and consummate a drug transaction. Despite his testimony that such a transaction was consummated, Donald Lowry was acquitted. The fact of the acquittal must be regarded as a categorical rejection of Fominaya's testimony on this point. Now we do concede the

Commission, in making the lot of defense lawyers as difficult as possible, has made any information "with sufficient indicia of reliability to support its probable accuracy" appropriate for consideration in making such factual determinations as were made here. See Commentary to Guideline, §6A1.3, which talks about "an acceptable evidentiary basis" for the findings required of the sentencing Judge. Cf., **United States v. Johnson, 823 F.2d 842 (5th Cir. 1987).** Next, the trial Court's findings were said to have been based on the testimony in the Record.

So postured, the issue here quickens and is easily resolved on the basis of the presence in, or absence from, the Record of a sufficient

evidentiary basis for the various factual findings being challenged herein.

We also concede it has been held that the burden is on one who would object to the application of the conspiracy Guidelines to show they withdrew from the conspiracy before November 1, 1987. See **United States v. Watford, 894 F.2d 665 (4th Cir. 1990)**. But Watford, can hardly be dispositive of the issue as postured here (1) by facts showing the jury's elimination of all of those who could possibly be regarded as having been members of any conspiracy with this petitioner after November 1, 1987. And, (2) by other facts which make it impossible that any identifiable person could rationally be held to

have been in a conspiracy with Jonathan Lowry after that date.

(e) ***The evidence failed to prove any attempt to obstruct justice, hence the two-point increase in the offense level was not justified.***

In his Report, the probation officer made reference to asserted threats made against Brady Locklear. Obviously, if threats were made, they occurred prior to any indictment in this case and after the government's cultivation of Locklear's testimony. Yet, there is no allegation concerning this asserted conduct in the indictment. Also, we only have Locklear's word that it happened. Further, it has never been held that a guilty verdict gospelizes everything a witness says.

(f) ***Given the fact that Jonathan Lowry's prior State felony drug offense was charged as having been***

committed "as part of the instant offense," the Court erred when it included this prior offense in calculating his criminal history score.

The facts here are specifically controlled by Guideline §4A1.2(a) (1), which expressly provides that a Court is only allowed, in calculating a defendant's criminal history score, to include "sentences previously imposed upon an adjudication of guilt, ..., for conduct not part of the instant offense."

(g) ***A sentence of life without parole under the facts here violates due process; hence was, and is, illegal.***

A sentence of life without parole is the sentence presented by Congress for the most severest of the drug offenses. Indeed the statute being referred to, i.e., 21 U.S.C., §848 (b) (2) (B), regarded as the "Super

Kingpin" statute provided a mandatory life sentence for the principle administrators, organizers, or leaders of narcotic enterprises that gross ten million dollars in a twelve (12) month period. If such is the penalty for these super kingpins, then giving Jonathan Lowry a "natural life" without parole sentence in these circumstances seems unduly severe.

We are aided in this position by the compelling decision of **United States v. Gomez**, 407 F. Supp. 407 (E.D. Mich. 1989).

CONCLUSION

In **Shepard v. United States**, the point was well made by Justice Cardoza, speaking for an unanimous Court, (in **United States v. Shepard**, 290 U.S. 96 [1933]) that a "trial

becomes unfair if facts developed at trial are used by an appellate Court [as they were by the appeals Court below] for different purposes, purposes that were unavowed and unsuspected" at the trial level. Id., 102-103). So in this case, the Government contended Jonathan Lowry had supervised certain individuals and for that reason they could be counted in meeting a numeral qualification. And, while no mention was made by the Government that our petitioner had organized anyone, the Court of Appeals without any input from either party, proceeded to sandbag this petitioner by inserting this new and different concept into the mix. Clearly this is wrong.

Surely then, if for no other

reason than to vindicate the notion that "an appellate court may only properly review a criminal case only on the theory submitted to the jury at trial by the prosecution,"[7] this cause should be reviewed.

This follows because, given the obviously irreconcilable conflict between the positions taken by the Third and Ninth Circuits in the Echeverri and Jerome cases and the resolution made by the Fourth Circuit in this case, this conflict alone supplies a sufficient reason to review this cause. And, when the other cogent reasons argued above are added, clearly this cause is one that ought to be reviewed and reversed.

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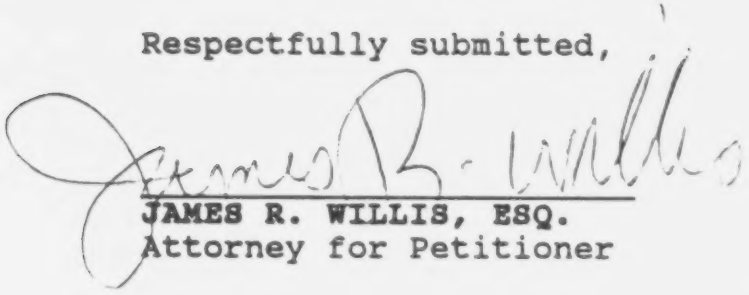
[7] United States v. Hannah, 584 F.2d 27, 32 (3d. Cir. 1978).

Also, this Court should face head on the apparent belief by the Fourth Circuit that a violation of the Interstate Travel Act (ITAR) can be viewed as a felony drug offense when such a determination is required to justify a CCE conviction.

Another critical point here, one we consider worthy of being weighted in our favor, is the fact that in our Petition For Rehearing (**Appendix "B"**) the most critical issues here were called to the Fourth Circuit's attention and they simply ignored what cannot be viewed as routine problems with the panel's decision.

For all of the reasons argued herein, this cause should be reviewed to the end that it can be reversed.

Respectfully submitted,



JAMES R. WILLIS, ESQ.
Attorney for Petitioner

91-1386

Supreme Court, U.S.
FILED
FEB 25 1992
OFFICE OF THE CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

JONATHAN LOWRY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
November 27,1991

No. 90-5516
CR-89-36-3

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

JONATHAN LOWRY

Defendant - Appellant

On Petition for Rehearing with Suggestion for Rehearing In Banc

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Appellant filed a petition for rehearing with suggestion for rehearing in banc. No member of the Court requested a poll on the suggestion for rehearing in banc, and the original judicial panel voted to deny the petition for rehearing.

APPENDIX "A"

The Court denies the petition for rehearing with suggestion for rehearing in banc.

Entered at the direction of Judge Chapman, with the concurrence of Judge Widener and Judge MacKenzie.

For the Court,

_____

CLERK

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Record No. 90-5516(L)
Cons. W/90-5518 & 90-5519

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

JONATHAN LOWRY,
BONITA LOWRY,
CARSON MAYNOR,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC

APPENDIX "B"

Jonathan Lowry, one of the appellants herein, moves the Court under favor of Rule 40, Federal Rules of Appellate Procedure, for a Rehearing of his appeal. Further, the appellant makes the clear and unequivocal Suggestion (as is permitted by Rule 35) that this cause should be considered in banc by the entire Court.

In support of this Petition and Suggestion for Rehearing In Banc, the following specific contentions are made:

1. That as argued below, it is apparent from a reading of the panel's decision material facts, established by undisputed evidence in the Record, have been overlooked. Also, the Court clearly has misclassified a Title 18 offense (i.e., 18

U.S.C., §1952) as a felony drug offense sufficient to be regarded as a predicate offense for a CCE (21 U.S.C., §848) conviction.

2. That by the panel's own admission its decision on unanimity conflicts with the Third Circuit's Opinion in **United States v. Echeverri, 854 F.2d 638 (3d Cir. 1988)**. The fact that the panel expressly concedes that "the third circuit ... [does] require specificity" (Opinion, p. 10) from jurors on certain essential elements of the CCE offense, makes it apparent

that the position of this Circuit on this issue should have the imprimatur of the full Court.

3. That in addition to the above issues (which clearly are worthy not only of Reconsideration by the Panel, but also by the full Court), the issue in this appeal as to inconsistent verdicts and the issue as to whether the number of people and the number of offenses required to satisfy certain numerical facets of the CCE offense are issues that are yet to be resolved by any Circuit. Given then the fact

that the CCE count in the indictment in this case, did not expressly incorporate any segment of the indictment as Rule 7(c)(1), Federal Rules of Criminal Procedure permits, the question here is whether one can be convicted on the basis of aspects of a charge that obviously [were] not considered on the basis of the Grand Jury's indictment. Here again the panel's decision conflicts, or at least appears to conflict, with those cases which require express incorporation in situations of this ilk. (Here we

incorporate by reference the arguments made in our Opening Brief, pp. 11-12.)

THEREFORE, for these reasons a Rehearing is required and it should be before the full Court.

Respectfully submitted,

_____

JAMES R. WILLIS, ESQ.
Attorney for Appellant Jonathan Lowry

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

United States of America, *Plaintiff-Appellee,*	:	
v.	:	No. 90-5516
Jonathan Lowry, *Defendant-Appellant*	:	
United States of America, *Plaintiff-Appellee,*	:	
v.	:	No. 90-5518
Bonita Lowry, *Defendant-Appellant*	:	
United States of America, *Plaintiff-Appellee,*	:	
v.	:	No. 90-5519
Carson Maynor, *Defendant-Appellant*	:	

Appeals from the United States District Court
for the Eastern District of
North Carolina, at Fayetteville
Malcolm J. Howard, District Judge
(CR-89-36-3) Argued: March 7, 1991

APPENDIX "C"

Decided: October 25, 1991

Before WIDENER, Circuit Judge, CHAPMAN, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

Affirmed by unpublished per curiam opinion

COUNSEL

ARGUED: James R. Willis, **WILLIS & BLACKWELL,** Cleveland, Ohio, for Appellant Jonathan Lowry; S. Mark Rabil, **BOWDEN & RABIL,** Winston-Salem, North Carolina, for Appellant Maynor; Renny Walter Deese, **REID, LEWIS, DEESE & NANCE,** Fayetteville, North Carolina, for Bonita Lowry. Christine Witcover Dean, Assistant United States Attorney, Raleigh, North Carolina, for Appellee. **ON BRIEF:** Margaret Person Currin,

United States Attorney, Raleigh, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

Appellants Jonathan Lowry, Bonita Lowry and Carson Maynor appeal their convictions of various drug related offenses following a jury trial in the Eastern District of North Carolina. Jonathan Lowry was convicted of all of the counts on which he was charged. This included Count 1, conducting a continuing criminal enterprise in violation of 21 U.S.C. § 848; Count 2, conspiracy to possess with intent to distribute and to distribute marijuana and

cocaine in violation of 21 U.S.C. § 846; Count 3, distribution of cocaine in violation of 21 U.S.C. § 841(a)(1); Count 4, interstate travel with the intent to promote the distribution of marijuana in violation of 21 U.S.C. § 841; and Count 5, money laundering in violation of 18 U.S.C. § 1956 (a)(1)(B)(i).

Bonita Lowry was charged in Count 2 with conspiracy to possess with intent to distribute and distributing marijuana and cocaine and in Count 6 with use of the telephone in facilitating the possession with the intent to distribute cocaine in violation of 21 U.S.C. § 843(b). She was convicted on Count 2 and was acquitted on Count 6.

Carson Maynor was convicted on Count 2 of conspiracy to possess with intent to distribute and with distribution of marijuana and cocaine. He was not charged in any of the other counts in the indictment.

Appellants challenge their convictions and their sentences. They claim error by the district court as follows:

(1) In failing to dismiss the indictment which failed to identify the five or more essential persons the grand jury relied upon in returning the continuing criminal enterprise charge against Jonathan Lowry; (2) in failing to strike the testimony of witness Brady Locklear that he had passed a polygraph test; (3) in admitting certain testimony of Special Agent W. R. Myers; (4) in admitting evidence, during the cross-examination of Jonathan Lowry's brother and codefendant Donald Lowry, that had the effect of placing Jonathan Lowry's character in evidence in violation of Federal Rule of Evidence 404; (5) in failing to instruct the jury that on the continuing criminal enterprise count it was required to reach a unanimous agreement as to the three acts

which constituted the continuing series of narcotics violations committed by Jonathan Lowry in order to convict him of operation a continuing criminal enterprise; (6) in failing to require the jury to indicate which of the numerous felony offense, as to which evidence was introduced, it relied upon in finding the continuing series element of the continuing criminal enterprise offense; (7) in failing to require the jury to agree unanimously as to the five or more persons acting in concert with Jonathan Lowry and with respect to whom he occupied a position as organizer, supervisor or other position of management, and to require unanimous agreement as to the continuing series of felony drug violations and to require unanimous agreement as to the continuing series of felony drug violations required under 28 U.S.C. § 848; (8) in finding Jonathan Lowry guilty of operating a

continuing criminal enterprise when the proof did not establish that he either (A) committed the required continuing series of felony drug violations or (B) did so in concert with five other persons as mandated by 21 U.S.C. § 848; (9) in sentencing Jonathan Lowry under the Sentencing Guidelines for conspiracy and operating a continuing criminal enterprise when other defendants were acquitted and the conspiracy did not exist after November 1, 1987, the effective date of the Sentencing Guidelines; (10) in excluding appellant Maynor's expert testimony that his I.Q. was 70 and his development abilities were equal to those of a third grader; (11) in the admission of statements made by Maynor during the search of his room; (12) in failing to grant Bonita Lowry's motion for acquittal on the conspiracy count when the evidence was not sufficient to establish that she was a knowing participant in the

conspiracy; (13) in the admission of testimony resulting from an alleged telephone conversation with Bonita Lowry; (14) in the admission of testimony that Bonita Lowry had smoked a marijuana cigarette, because this evidence of illegal conduct was not charged in the indictment.

I

The indictment alleged a conspiracy beginning on or about January 1, 1981, and continuing until March 1988, which conspiracy included Jonathan Lowry, Bonita Lowry, Carson Maynor, Donald Lowry and Hardy Wynn (all of whom were indicted) and unindicted co-conspirators: Kelly Ray Chavis, Pedro Ernesto Fominaya, Hanson Hunt, Brady Locklear, James Fuller Locklear, James Harold Maynor, David O. Mercer and others known and unknown to the grand jury. A number of the unindicted co-

conspirators had, prior to trial, entered into plea agreements with the government and testified against appellants.

The jury acquitted Donald Lowry and Hardy Wynn on the conspiracy count, but it convicted Jonathan Lowry, Bonita Lowry and Carson Maynor on this count. Bonita Lowry was acquitted on the use of a telephone in furtherance of the drug distribution as charged in Count 6.

The jury was requested to return a special verdict as to whether each defendant's involvement in the conspiracy continued past November 1, 1987, the effective date of the Sentencing Guidelines. On this inquiry the jury found that Jonathan Lowry had participated after the date, but that Bonita Lowry and Carson Maynor had not.

On the continuing criminal enterprise count, the

jury was charge in part:

> It must also be proved in this count that the defendant engaged in the continuing series of violations with at least five or more persons, whether or not those persons are named in the indictment and whether or not the same five or more persons participate at different times;
>
> You must identify these five or more persons to yourself and be unanimous in your selection of at least five or more persons;
>
> And it must be proved that the defendant's relationship with the five or more persons was that of an organizer, supervisor or manager; that he was more than just a fellow worker and either organized or directed the activities of the others, whether he was the only organizer or supervisor or not.

When the verdict was returned, the jury produced a written list entitled "People Involved in the CCE" and named such persons as "Ernest Harris, Kelly Ray Chavis, Charles Smith, David Mercer, Brady

Locklear, Pedro Fominaya, James E. Maynor, Carson Maynor, Bonita Jones Lowry, and Reenes Locklear (proper spelling is "Renice")." The evidence established to the satisfaction of a jury that there was a conspiracy beginning in early 1981 to buy, sell and distribute marijuana and cocaine. The dominant figure in this conspiracy was Jonathan Lowry, and the conspirators' activities centered around Lowry's residence and his body shop in Robeson County, North Carolina. A large portion of the marijuana and cocaine was obtained by Jonathan Lowry and his associates from Pedro Fominaya in Florida. Fominaya was a witness for the prosection and testified to the sales of marijuana and cocaine to Jonathan Lowry and those associated with him. A number of the other co-conspirators entered plea agreements and testified for the government.

II

Jonathan Lowry unsuccessfully moved to dismiss the indictment on the ground that it was defective because it did not identify the five or more persons the grand jury relied upon as being "in concert" with Lowry in operating the continuing criminal enterprise in violation of 21 U.S.C. § 848. Appellant concedes that under *United States v. Amend*, 791 F.2d 1120, 1125 (4th Cir.), cert. denied, 479 U.S. 930 (1986) and *Hamling v. United States*, 418 U.S. 87, 117 (1974), an indictment which tracks the language of the statute is sufficient to satisfy the requirements of due process. However, he argues that in a continuing criminal enterprise prosecution the circumstances are unique. Merely tracking the statute by charging that the accused committed a "continuing series" of acts without identifying the various acts

relied upon as the basis for the continuing criminal enterprise charge, and tracking the statute but failing to identify the five or more persons required to meet the numerical element of the offense, does not reflect what the grand jury may have relied upon. This puts the prosecution in a position to convict on the basis of acts that were a part of the indictment.

A second superseding indictment was returned after the appellant's motion to dismiss the prior indictment, but the continuing criminal enterprise count was the same in each indictment and the charge merely follows the language of 21 U.S.C. § 848. Appellant Lowry argues that this charge does not supply enough information to allow him to prepare his defense.

By a letter of October 18, 1989, the United States Attorney advised defense counsel of four predicate offenses that would be used to prove the

"continuing series" of acts and, in the same letter, furnished the names of seven individuals as "some of the persons whom Lowry supervised." Lowry had additional information from discovery, such as all law enforcement reports, and he was provided Jencks material at the time of jury selection. He has not shown, nor even alleged, that he suffered any specific prejudice or that he was surprised by any witnesses called by the prosecution.

The charge in the indictment tracked the language of the statute, and this is sufficient under Amend and Hamling, supra, particularly where there has been no showing of prejudice. It was not error for the district court to deny the motion to dismiss the indictment.

III

Appellants claim that the trial judge erred in

filing to strike the testimony of government witness Brady Locklear, who on cross-examination stated that he had taken a polygraph test. Appellant claims that this statement had the effect of impermissibly bolstering Locklear's testimony and his credibility in the eyes of the jury. Appellant argues that this prejudicial statement was volunteered by the witness and was not responsive to any question asked of him. Counsel moved to strike Locklear's statement, but the Court denied this request and in doing so stated: "counsel; you opened the door." Defense counsel and the judge then asked the witness a number of questions that clearly established that the polygraph was not in reference to his testimony being given in this case. No curative instruction was given to the jury concerning the polygraph statement.

The law is settled in the Fourth Circuit that

evidence of a witness having taken a polygraph is inadmissible. *United States v. Tedder,* 801 F.2d 1437, 1444 (4th Cir. 1986), *cert. denied*, 480 U.S. 938 (1987). However, on the present record we find the error to be harmless. The questioning of Locklear, after he made this objectionable comment, clearly established that the polygraph was not given in connection with the testimony he was giving against Lowry, so it would not have unduly bolstered his credibility.

While the trial judge should have sustained the objection, struck the witness' statement and given a curative instruction, we are inclined to agree with his statement to counsel that he had "opened the door." The witness was being subjected to a vigorous cross-examination about that section of his plea agreement which required him to give truthful testimony in court

if called as a witness. Counsel had repeatedly asked if the agreement did not provide that the government was to be the sole judge of whether he had told the truth. It is obvious that the witness was trying to protect himself against insinuations of counsel that he was tailoring his answers to please the government. It does not appear from the record that the witness was trying to increase his credibility so as to bolster his testimony in the eyes of the jury, but was merely trying to protect himself from the insinuations being made. Since it was clearly shown that Locklear's trial testimony was not subjected to a polygraph, we find the error harmless.

IV

Jonathan Lowry argues that the testimony of S.B.I. Agent W. R. Myers as to three undercover drug purchases made by a confidential informant from James

Harold Maynor was hearsay and, since these purchases were overt acts made in the furtherance of a conspiracy, Lowry's right to confrontation was violated.

Agent Myers testified that he initiated and was in charge of an investigation of the illegal drug activities of James Maynor, and in the course of this investigation he initiated three "controlled buys" of drugs from Maynor by a confidential informant. Two purchases were made and on the third purchase Maynor was arrested. The purchases were set up by telephone calls to maynor. Myers testified that he personally dialed the number and then the informant conducted the conversation in his presence. Myers did not testify as to what was said in the telephone conversations, but did testify that the conversations were made to set up the drug transactions. Three of

the calls were made to Jamestown Satellite Sales and one was made to Maynor's residence. A total of one and one-half pounds of cocaine was obtained in the three purchases, and as a result of these sales, James Maynor was convicted of drug offenses.

Agent Myers was not testifying as to what he had been told by a confidential informer, but he was relating what he had done and what he had seen. He was describing the actions of the informant from his personal observation. An agent who observes an informant's actions and describes them to the jury is not giving hearsay testimony but is "testifying as to a fact within his own personal experience." *United States v. Gandara*, 586 F.2d 1156, 1158 (7th Cir. 1978); see also *United States v. Kabababy*, 673 F.2d 857, 863 (11th Cir. 1982).

V

Jonathan Lowry argues that the prosecution improperly placed his character in issue in violation of Federal Rule of Evidence 404, which provides in part:

> Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
>
> (1) **Character of accused.** Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same.

The reference was to Jonathan Lowry's reputation as a drug dealer, and it occurred during the government's cross-examination of Donald Lowry, the brother of Jonathan. Donald Lowry as a codefendant and had been indicted in the conspiracy count. He took the stand in his own defense and denied any involvement in any illegal drug business. He also denied knowing certain members of the alleged conspiracy, and he was acquitted by the jury. He was

asked if he knew his brother was in the drug business, and he stated: "From hearsay." He was then asked: "Did your brother have a reputation for being a drug dealer?" He responded: "I have heard it, yes."

The district court ruled that this testimony was not admitted for the purpose of showing that Logan's conduct on a particular occasion was in conformity with such reputation but was admitted for the purpose of showing the defendant Donald Lowry's knowledge and participation in the conspiracy. Under Rule 404(b), evidence of other wrongs may be admissible to prove opportunity, intent or knowledge, and it was on the basis that the trial judge allowed Donald Lowry to be asked whether he was aware of his brother's reputation for being a drug dealer. Upon this ground and under the facts of this case, we cannot say that the trial judge abused his discretion in allowing this one

question and answer.

VI

Appellant Jonathan Lowry claims a denial of due process because the trial court refused to instruct the jury that in order to convict on the continuing criminal enterprise count they must be unanimous as to the three acts constituting the "continuing series" of narcotics violations required by 21 U.S.C. § 848, unanimous that he supervised at least five persons, and unanimous as to the identity of these persons. He argues that this is particularly important where evidence has been submitted as to more than three felony drug offenses and that the jury must be unanimous as to three specific offenses.

The trial judge gave a general unanimity charge and also charged as to the persons supervised: "You must identify these five or more persons to yourselves

and be unanimous in your selection of at least five or more persons." When it returned its verdict, the jury listed the names of eleven persons who were supervised, organized or managed by Jonathan Lowry. This list of eleven persons is clearly sufficient under the statute, under the charge, and under due process to reflect unanimity on this element.

As to the specific unanimity charge on the three predicate acts, Lowry relies upon *United States v. Echeverri*, 854 F.2d 638, 642 (3d Cir. 1988), which held that where the government has offered evidence of a plethora of drug-related activity, it was error for the trial court not to charge the jury that it must unanimously agree on which three acts constitute the continuing series of violations. The Third Circuit is alone in requiring this specificity.

We find *United States v. Rosenthal*, 793 F.2d

1214, 1226 (11th Cir.) modified on other grounds, 801 F.2d 378 (4th Cir. 1986), *cert. denied,* 480 U.S. 919 (1987), and *United States v. Hernandez-Escarsega,* 886 F.2d 1560 9th Cir. 1989), *cert. denied,* 110 S. Ct. 3237 (1990), more persuasive. In *Hernandez-Escarsega,* the court that, in ordinary cases, a general instruction of unanimity was sufficient, but if

> it appears ... that there is a genuine possibility of jury confusion or that a conviction may occur as the result of different jurors concluding that the defendant committed different acts, the general unanimity instruction does not suffice." In such situations, the trial court must augment its general instruction to ensure that the jury understands its duty unanimously to agree to a particular set of facts. We need not decide in the instant case, however, whether such augmentation was necessary to safeguard Hernandez' rights, because we find that the facts support the conclusion that the jury unanimously agreed on three predicate offenses. Thus, any instructional error was harmless.

886 F.2d at 1572 (citations omitted) (quoting *United States v. Encheverry [sic]*, 719 F.2d 974, 975 (9th Cir. 1983).

The same reasoning is applicable to our facts. The jury unanimously found Jonathan Lowry guilty of Counts 3 and 4. Count 3 charged him with distribution of 167 grams of cocaine on January 25, 1985, and Count 4 charged him with interstate travel on November 26, 1985, with the intent to promote and carry on a business involving distribution of marijuana. The jury also unanimously found that Jonathan Lowry committed another offense after November 1, 1987. This involved his order of 10 kilograms of cocaine from Fominaya during the last week in December 1987 as Lowry was traveling to Melbourne, Florida, to surrender himself and begin serving a Florida sentence. It was at this time that Lowry instructed Fominaya to

continue working with Lowry's brother, Donald. Fominaya testified that this cocaine was eventually delivered to Donald Lowry.

Since it is obvious from the jury's verdict that it unanimously found appellant Jonathan Lowry guilty of three predicate offenses, a specific unanimity charge on this element was not necessary.

VII

Jonathan Lowry challenges the sufficiency of the evidence to support his CCE conviction. First, he claims that there was not proof that he managed, organized or supervised five other persons, because David Mercer, Ernest Harris, Kelly Chavis and Charles Smith were only purchasers of drugs and not employees or persons supervised, and there was no evidence to connect him with Fuller Locklear, Hanson Hunt, and John Hunt. He also claims that the record

fails to support a finding that he controlled Renice Locklear, Carson Maynor, Bonita Lowry, Pedro Fominaya, James Maynor, or Brady Locklear. He asserts that drug sales to such persons for cash or on credit is not sufficient to establish a supervisory or managerial role, and he claims that the prosecution has shown nothing more than a number of buyer-seller transactions or relationships and that *United States v. Butler*, 885 F.2d 195, 200-01 (4th Cir. 1989), holds this is not sufficient under § 848, 885 F.2d at 201. While *Butler* does state that "the mere showing of a buyer-seller relationship, *without more, is not sufficient under § 848*" (emphasis added), it gives considerable guidance on this issue:

> The issue of what sorts of relationships satisfy § 848's requirement that a defendant "organize, supervise, or manage" other persons involved in federal narcotics crimes has received a good deal of judicial attention.

although no simple test has been developed, a number of guiding principles have emerged. First and foremost, the terms "organize, supervise, or manage" are used disjunctively in the statute such that it is only necessary that any one of these three relationships be shown to exist between the defendant and a particular underling or associate. *United States v. Apodaca*, 843 F.2d 421, 426 (10th Cir.) *cert. denied.* --U.S.--, 109 S. Ct. 325, 102 L.Ed.2d 342 (1988). Further, these terms should be applied in their ordinary sense as understood by the public or the business community. *See, e.g., United States v. Moya-Gomez* 860 F.2d 706 (7th Cir. 1988; and *United States v. Wilkinson*, 754 F.2d 1427 (2nd Cir. 1985), 472 U.S. 1019, 105 S.Ct. 3482, 87 L.Ed.2d 617 (1985). "The defendant's relationships with the other persons need not have existed at the same time, the five persons involved need not have acted in concert at the same time or with each other, and the same type of relationship need not exist between the defendant and each of the five." *United States v. Apodaca*, 843 F.2d at 426, citing *United States v. Becton*, 751 F.2d 250, 254-55 (8th Cir. 1984), *cert. denied*, 472 U.S. 1018, 105 S.Ct. 3480, 87 L.Ed.2d 615 (1985). *See also United States v.*

> *Aiello*, 864 F.2d 257 (2nd Cir. 1988); *United States v. Rhodes*, 779 F.2d 1019 (4th Cir. 1985), *cert. denied*, 476 U.S. 1182, 106 S.Ct. 2916, 91 L.Ed.2d 545 (1986). Nor need the defendant have personal contact with the five persons because organizational authority and responsibility may be delegated. *See, e.g., United States v. Alvarez*, 860 F.2d 801, 816 (7th cir. 1988) and *United States v. Apodaca, supra.* And while proof of a supervisory or managerial relationship requires a showing of some degree of control by the defendant over the other persons, such proof is not required to show that a defendant acted as an organizer. "[A]n organizer can be defined as a person who put together a number of people engaged in separate activities and arranges them ... in one essentially orderly operation or enterprise." 2 E. Devitt & C. Blackmar, Federal Jury Practice & Instructions § 58.21 (1977). Finally, the mere showing of a buyer-seller relationship, without more, is not sufficient under § 848. *United States v. Apodaca, supra.*

885 F.2d at 200-01.

Of course, sufficiency of the evidence disputes require us to view the evidence in the light most

favorable to the prosecution and decide whether the evidence is sufficient for any rational trier of fact to find proof of the essential elements of a crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

While Lowry may score a point or two on his claim that he did not manage or supervise some of the persons named by the government, he cannot evade the claim that he was an organizer of this extensive illegal drug enterprise. As *Butler* holds, the relationship with the five persons need not exist at the same time. The conspiracy in this case is alleged to have existed over a period of seven years, and it was not claimed that Lowry was involved with all of the alleged persons during the entire time.

Lowry had an ongoing relationship with Ernest Harris that was more than a buyer-seller arrangement.

Lowry dictated the price and, when Harris could not pay, Lowry demanded that Harris take him to Florida and introduce him to Harris' drug source. While in Florida, they purchased cocaine and marijuana together. Harris both used and sold drugs he obtained from Lowry, who fronted drugs to him. In exchange for drugs, Harris conveyed Land to Lowry and James Maynor, who built a shopping center on some of this land. The relationship of Harris and Lowry was more than that of a buyer-seller and was sufficient in number of contacts, duration, volume of narcotics purchased and Harris' compliance with Lowry's directions to demonstrate management and supervision of Harris by Lowry. "[T]he management element is established by demonstrating that the defendant exerted some type of influence over another individual as exemplified by that individual's compliance with the defendant's directions,

instructions, or terms." *United States v. Possick*, 849 F.2d 332, 336 8th Cir. 1988).

Jonathan Lowry recruited David Mercer to become a cocaine salesman shortly after Mercer had been released from prison following a counterfeiting conviction and sentence. Mercer was operating a pawn shop at the time Lowry approached him about selling cocaine to be furnished by Lowry. In his first deal with Lowry, Mercer obtained one and one-half ounces of cocaine. He was able to sell only one ounce, and Lowry repurchased the one-half ounces of cocaine that had not been sold. Later Lowry furnished three one-half ounces of cocaine to Mercer, which Mercer immediately resold. Unbeknownst to Mercer and to Lowry, Mercer had sold the cocaine to Teddy Green, an undercover police officer and Mercer was arrested. Lowry's recruiting of Mercer, selling cocaine to

Mercer and buying back the unsold portion were acts of an organizer, and Mercer was properly counted as one of the necessary five persons under § 848.

The testimony of Charles Smith was sufficient to establish that he was brought into Jonathan Lowry's organization and was controlled to a certain extent by Lowry in his drug dealings. Smith had retrieved several hundred pounds of marijuana from the landfill after police had unsuccessfully attempted to destroy it by fire. He contacted James Maynor, who introduced Smith to Jonathan Lowry. Smith took the marijuana to Lowry's mobile home, and it was weighted on a scale in Lowry's living room. Lowry set the price he would pay for the marijuana and this was at a reduced rate because of the damage done by the fire. As payment for this marijuana, Lowry gave Smith cash and a small rock of cocaine. During most of this transaction,

Bonita Lowry was present together with Jonathan Lowry, James Maynor and Smith. Thereafter for several months, Jonathan Lowry fronted cocaine to Smith on credit for Smith's use and resale. During this time, Lowry furnished Smith with approximately one pound of cocaine.

The testimony of Pedro Fominaya was sufficient to prove that he was brought into the organization by Jonathan Lowry and that Lowry exercised a degree of control over him. Fominaya met Lowry in Miami in late 1982 and at that time sold him approximately 200 pounds of marijuana. In the beginning of their relationship, Fominaya dealt with Lowry through one Gene Carter, but shortly thereafter they dealt directly. In the beginning, Lowry went to Florida to buy and receive delivery of drugs for him. Thereafter, Fominaya began to travel to North

Carolina, and his first sale to Lowry in North Carolina was 4,000 pounds of marijuana delivered to Lowry's mobile home. Larry paid for only a part of this load because of its quality.

Over time, Fominaya began to supply Lowry with cocaine in amounts of four to eight kilos at a time. Fominaya made numerous trips to North Carolina and delivered cocaine to Larry's mobile home, his body shop, and at other places designated by him. There were times when Lowry refused cocaine delivered by Fominaya to bring more cocaine than he wanted to buy in order that Lowry could select what he wanted.

Lowry had Fominaya pick him up and drive him to Melbourne, Florida, when he was reporting to the correctional institution to begin service of his state sentence. It was during this journey in December 1987

that Lowry directed Fominaya to deliver certain cocaine to his brother Donald Lowry.

Fominaya and Lowry worked together for approximately three years, and during this time Fominaya furnished Lowry approximately 200 kilograms of cocaine plus several thousand pounds of marijuana. After Lowry went to prison in December 1987, Fominaya got out of the drug business.

The testimony of Brady Locklear was also sufficient to show that he had been brought into the organization by Jonathan Lowry and was directed by Lowry. Locklear testified that Lowry set up the deals but that he, Locklear, took most of the risks of transportation. Lowry directed Locklear as to when and where to pick up drugs in Florida and transport then back to North Carolina.

There were also other persons directed by

Jonathan Lowry and brought into the organization by him, but it is not necessary to go into the details of each of these persons, since there was ample proof of his organizing and directing at least five persons in this drug enterprise.

VIII

It was not error for the district court to sentence Jonathan Lowry under the Sentencing Guidelines. He argues that the jury's verdicts finding him guilty of conspiracy and of conducting a continuing criminal enterprise are inconsistent with the verdicts acquitting Donald Lowry and Hardy Wynn of conspiracy and the acquittal of Bonita Lowry on the use of the telephone charge contained in Count 6. Lowry argues that collateral estoppel bars the court from finding that a conspiracy existed after November 1, 1987. His claim rests upon the assertion that the jury obviously rejected

most of the testimony of Pedro Fominaya that Donald Lowry and Hardy Wynn were involved in numerous narcotics transactions with him and that he, Fominaya claimed to have talked with Bonita Lowry by telephone on November 26, 1985, as alleged in Count 6. He also asserts that the court was estopped by the verdicts from finding that the conspiracy and the continuing criminal enterprise, if they did exist, extended past November 1, 1987, and, since the Pedro Fominaya testimony was discredited, there was no support for the finding that Jonathan Lowry was accountable for the 150 kilograms of cocaine Fominaya testified he supplied to him. Lowry argues that these critical findings are sufficiently inconsistent with the verdicts so as to bar by collateral estoppel the guilty verdicts of Jonathan Lowry. To allow Lowry's verdicts to stand, he argues, would violate the constitutional guaranty

against double jeopardy.

Lowry argues that the not guilty verdicts as to Donald Lowry, Hardy Wynn, and Bonita Lowry must be regarded as a total rejection of Fominaya's testimony as to them, and as to the quantities of drugs he testified he delivered to them.

Inconsistent verdicts are not unusual. They may result from mistake or from lenity. The Supreme Court has said: "[T]he best course to take is simply to insulate jury verdicts from review on this ground." *United States v. Powell*, 469 U.S. 57, 69 (1984). While the jury found that Donald Lowry and Hardy Wynn were not guilty of conspiracy, it found that Jonathan Lowry, Bonita Lowry and Carson Mayor were guilty. The jury is always instructed that it may believe all of the witness' testimony, or only part of such testimony, or none of such testimony.

We find no merit to Jonathan Lowry's contention that his sentence under the guidelines violates the *ex post facto* principle. There was testimony of Lowry's activities, which were in furtherance of the conspiracy, in the last week of December 1987 after the effective date of the Sentencing Guidelines. We have held that a defendant may be sentenced under the guidelines when a conspiracy started before the effective date of the guidelines, but ended after the effective date. *United States v. Sheffer*, 896 F.2d 842, 845 (4th Cir.), *cert. denied*, 111 S. Ct. 432 (1990). The application of the guidelines to an ongoing conspiracy, which is in existence after the effective date of the guidelines, does not violate the *ex post facto* clause.

There is no merit to his claim that aggregating the total amount of the drugs, which would include

those prior to the Sentencing Guidelines, also violates the *ex post facto* clause. This issue is also answered in *Sheffer*. *See* 896 F.2d at 845.

We find that there was substantial evidence to support the sentencing judge's finding that Jonathan Lowry's offense involved at least 250 kilograms of cocaine and 7500 pounds of marijuana. Many of the prosecution witnesses testified as to the weight of drugs and the many sales, payments and deliveries during the course of the conspiracy. We find no merit to appellant's claim that the sentencing court applied the wrong version of the guidelines.

We find no error in the sentencing court's two level increase upon its finding that Jonathan Lowry threatened and intimidated Brady Locklear in September 1988. There is preponderance of evidence supporting the court's finding on this point. Likewise,

we find no error in the sentencing court's consideration of Lowry's prior conviction in calculating his criminal history score nor do we find error in the court's sentence, which is within the guidelines.

IX

Appellant Maynor claims error by the district court in not allowing him to present an expert witness to testify as to his low intelligence quotient (I.Q.). The government objected to this testimony because Maynor had not complied with the notice requirements of Federal Rule of Criminal Procedure 12.2(b). Maynor argues that he gave the government actual notice when he filed his motion for severance which indicated that it was possible that his defense would be antagonistic to that of his codefendants because he might present evidence of a low I.Q. We find no abuse of discretion in the court's refusal to permit this

testimony.

Maynor also contends that the government should have taken steps to have him mentally examined. Such an examination would have been possible if he had given proper notice under Rule 12(b), but such notice was not given. An examination pursuant to 18 U.S.C. § 4241 would be possible only if the government had some basis to believe that Maynor was incompetent. The government was aware that he had previously gone to trial on state charges without raising a defense of incompetency or mental defect. Maynor did not comply with the rule, and he has not shown that the government had any reason to have him mentally examined.

X

Appellant Maynor claims error by the trial court in admitting certain statements made by him at the time

of a search of his room by law enforcement officers on January 25, 1985. Maynor claims that, at the time the statements were made, he was in custody and had not been advised of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), nor had he waived his rights. These statements include answers given by Maynor to questions of police officers and some statements that he volunteered or made which were not in answer to specific questions.

At trial, the court conducted a voir dire hearing as to the admissibility of these answers and statements. After a full hearing, including argument of counsel, the court found that the statements and answers were admissible under *Berkemer v. McCarty*, 468 U.S. 420 (1984), because the defendant had not been taken into custody at the time the police asked routine questions to which Maynor was not obligated to answer.

We find no error in this ruling.

Maynor also claims error in the admission of his statements because they were not produced prior to trial in response to his motion made under Federal Rule of Criminal Procedure 16(a)(1)(A). It appears from the record that the government produced certain evidence prior to trial but did not produce a complete copy of the SBI report concerning the search of Maynor's room. It produced a three page report of the search and what was found, but this report did not include statements or answers made by Maynor during the search. This issue was covered in the voir dire hearing as to the admissibility of the statements. At this time, a copy of the statements was produced. It also appears that defense counsel was aware that Maynor had made certain statements at the time of the search because of the testimony given by police

officers during Maynor's state prosecution.

Under Federal Rule of Criminal Procedure 16(d)(2), the court has the power to sanction parties who do not comply with Rule 16. One of the sanctions is to deny admissibility of the material. We find no abuse of the court's discretion in failing to deny admissibility of Maynor's statements under the facts in this case.

XI

Bonita Lowry attacks the sufficiency of the evidence to support her conviction of conspiracy. When we review a challenge to the sufficiency of evidence, we must view the evidence in the light most favorable to the government. *Glasser v. United States*, 315 U.S. 60, 80 (1942). We must then decide whether any rational trier of fact could have found the essential

elements of the crime had been proved beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

Mrs. Lowry argues that because she was acquitted on the telephone count, evidence of her alleged telephone conversation with Pedro Fominaya, which is the subject of that count, may not be considered in deciding whether there was sufficient evidence on the conspiracy count. She attempts to make a collateral estoppel argument, but this doctrine does not apply. Collateral estoppel prevents facts "necessarily determined in the defendant's favor" from being relitigated in a later prosecution against the same defendant. *United States v. Head*, 697 F.2d 1200, 1208 (4th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983). The conspiracy charge and the telephone charge against Bonita Lowry were made in a single

indictment and tried together in a single trial.

Appellant's reliance on *United States v. Powell*, 469 U.S. 57 (1984), is misplaced. *Powell* cuts against her position. *Powell* was charged with various drug offenses including conspiracy to possess cocaine with intent to distribute, possession with intent to distribute, and several counts of using the telephone to facilitate the conspiracy and the possession. She was acquitted of the conspiracy and possession counts, but convicted on some of the telephone counts. Powell claimed that she had been acquitted on the predicate offenses of conspiracy and possession, and therefore she could not be guilty of facilitating the crimes of which she had been acquitted. The Court found that the verdicts were inconsistent, which may have resulted from mistake, compromise or lenity, and stated:

> [R]espondent's argument that an acquittal on a predicate offense

> necessitates a finding of insufficient evidence on a compound felony count simply misunderstands the nature of the inconsistent verdict problem. Whether presented as an insufficient evidence argument, or as an argument that the acquittal on the predicate offense should collaterally estop the Government on the compound offense, the argument necessarily assumes that the acquittal on the predicate offense was proper--the one the jury "really meant." This, of course, is not necessarily correct; all we know is that the verdicts are inconsistent. The Government could just as easily--and erroneously--argue that since the jury convicted on the compound offense the evidence on the predicate offense must have been sufficient. The problem is that the same jury reached inconsistent results; once that is established principles of collateral estoppel--which are predicated on the assumption that the jury acted rationally and found certain facts in reaching its verdict--are no longer useful.

469 U.S. at 68.

The testimony of Fominaya as to his telephone conversation with appellant Bonita Lowry may be considered in weighing the sufficiency of the evidence

to convict her on the conspiracy count. We find no merit to her claim that the testimony of Fominaya as to his telephone conversation with her in November 1985 was erroneously admitted because an insufficient foundation was laid for its admission. The testimony reflects that Fominaya had many contacts with Bonita Lowry. They had visited in one another's homes, and he was clearly in a position to be able to testify that he recognized her voice and that he was talking by telephone with her. Federal Rule of Evidence 901 sets forth the requirement of authentication or identification as a condition of admissibility is satisfied by, among other things "[i]dentification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker." Fed. R. Evid.

901(b)(5). Appellant could argue to the jury that Fominaya was not familiar with her voice, but this would go to credibility and weight and not to admissibility. *See United States v. Kandiel*, 865 F.2d 967, 974 (8th Cir. 1989).

"For the purposes of appellate review, only slight evidence is necessary to connect a person with a conspiracy." *United States v. Alvarez*, 548 F.2d 542 (5th Cir. 1977). The *Alvarez* court stated:

> Mature reflection has convinced us, however, that the "slight evidence" rule is of doubtful application to the state of facts presented here, where the issue of review is whether Alvarez was connected with the demonstrated conspiracy *at all*. It being of the nature of a conspiracy to conceal itself, the "slight evidence: rule finds its proper application where persons are clearly connected to the conspiring group or are found acting in such a manner as unmistakably to forward its purposes. In such instances, given the clandestine character of such projects, slight additional evidence suffices to base an

> inference that one who had been shown beyond a reasonable doubt to be a participant was as well a *knowing* participant. But where, as here, the question is whether a defendant was connected with the conspiracy at all, to apply such a rule is to risk convicting him of the crime itself upon "slight evidence." We conclude that Alvarez' presence at the river must be established by evidence which a jury could conclude rules out any reasonable hypothesis of innocence. *Holland v. United States*, 348 U.S. 121, 139-40. 75 S. Ct. 127, 99 L.Ed. 150 (1955). Once presence is so established, as to his knowing participation, the "slight evidence" rule may have its day.

548 F.2d at 544 (emphasis in original).

Conspiracy to distribute and possess with intent to distribute requires proof that Bonita Lowry "knew the conspiracy's purpose and took some action indicating her participation." *United States v. Crockett*, 813 F.2d 1310, 1316 (4th Cir.), *cert. denied*, 484 U.S. 834 (1987).

There is an abundance of evidence to establish

that Bonita Lowry knew of the conspiracy and was closely connected with it and to those conducting it. She lived with her husband, who was the kingpin of the conspiracy, in their jointly owned mobile home. This home was used for the purchase and sale of drugs. Charles Smith testified that Mrs. Lowry was present in the home when he delivered several hundred pounds of marijuana, that she was in and out of the room while he and Jonathan Lowry were discussing the price and weighing the drug. There was testimony of Renice Locklear that Mrs. Lowry had smoked marijuana in her presence, so she must have recognized the plant when she saw it in her living room, and she obviously had possession of enough marijuana to make one joint. She had accompanied her husband and Brady Locklear to Florida and met with Pedro Fominaya, visited in his home, cruised on his boat and

had her picture taken with him in a Miami restaurant. She worked for her husband and James Maynor at Jamestown Enterprises and there was testimony that numerous drug sales took place at this location. When Pedro Fominaya came to North Carolina on a drug related visit, she and her husband met him at the airport and took him to their home. She was aware that Fominaya would not spend the night at their home because of concern resulting from his having been searched by law enforcement officers at the airport when he arrived. Pedro Fominaya testified that he had delivered large quantities of drugs to Jonathan Lowry at his trailer on at least five and possibly as many as ten occasions, and that he was paid in cash for these drugs at the time of delivery. He also testified to drug deliveries at Jonathan Lowry's auto repair shop which was directly across the street from the trailer.

Fominaya testified that he had met Bonita Lowry on 15 or 20 occasions and that he had brought a diamond ring from Florida to North Carolina for Jonathan to give to Bonita. He had also visited in their new brick home which they had built and moved into after they left the mobile home. There was also the testimony of Fominaya that he had telephone conversations with Bonita Lowry in November 1985 at which time he sought the whereabouts of Jonathan. Bonita gave him a telephone number in Florida, but when he could not reach Jonathan he called back and advised her that his (Fominaya) boys had already left to make a drug delivery in Jacksonville, and Bonita said she would so advise Jonathan. Although Bonita Lowry claims that this telephone conversation was not admissible and may not be considered in determining the sufficiency of the evidence to sustain her conviction, we find that it is

admissible and the fact that she was acquitted on the telephone count goes to the weight given this testimony and not its admissibility.

When Jonathan Lowry was arrested in Florida, he had Bonita's suitcase, identified by her name tag attached to it. She was aware that he had this luggage with him on this particular trip, although she remained in North Carolina. At the time of Jonathan Lowry's arrest, this suitcase contained $280,000 in cash.

We find that the evidence was sufficient to raise an inference that Bonita Lowry was not only aware of the drug conspiracy, but that she actively participated in it to further its purposes. *United States v. Sisca*, 503 F.2d 1337 (2d Cir.), *cert. denied*, 419 U.S. 1008 (1974), is instructive on this point:

> The government does not rely on Hoke's mere presence at the premises where contraband was found, as in *Kearse*; nor was his involvement as

> limited as that of the chauffeur of a drug dealer in *Stewart*. Hoke was the owner, and shared with his wife exclusive possession, of a house found strewn with narcotics and various other paraphernalia of a heroin trafficking operation. This, coupled with his presence on the premises while others entered and left carrying containers of heroin, clearly permitted the inference that Hoke performed the critical role of maintaining the "stash" or "safe haven" for the distribution operation.

503 F.2d at 1343.

Bonita Lowry was married to and lived with Jonathan Lowry, first in the mobile home and then in their brick house. She worked for him at Jamestown Enterprises and at his drag strip. She traveled with him to Florida and had met and been entertained by Pedro Fominaya, her husband's primary source of marijuana and cocaine. Fominaya testified that he had met Bonita Lowry 15 or 20 times on his trips to North Carolina and that the only reason for any of his trips to

North Carolina was to deliver drugs purchased by Jonathan Lowry and to discuss the drug business. These drug deliveries were often made at Bonita Lowry's home. Mrs. Lowry knew that on one trip from Florida to North Carolina, Fominaya was searched by law enforcement officers before he boarded the plane in Florida and after he disembarked in North Carolina, and that he would not stay at her home on that trip because of concern for further action by the police. In November 1985, Bonita Lowry told Fominaya that she would pass the word to her husband that Fominaya's men had left Miami to deliver drugs to him Jacksonville. Bonita Lowry was also in the home and often in the room when Charles Smith delivered several hundred pounds of marijuana and Smith and Jonathan Lowry discussed and agreed upon a price for this delivery.

We find no merit to Bonita Lowry's claim that the district court committed prejudicial error in allowing Renice Locklear to testify that Bonita Lowry had smoked a marijuana cigarette in her presence. We find that this is not a violation of the prohibition of bringing in evidence of an uncharged offense and that the evidence was relevant to proving Bonita Lowry's knowledge of and participation in the conspiracy and her possession of marijuana cigarette in her presence. We find that this is not a violation of the prohibition of bringing in evidence of an uncharged offense and that the evidence was relevant to proving Bonita Lowry's knowledge of and participation in the conspiracy and her possession of marijuana at a time when large quantities of these drugs were being delivered and bargained for in her home.

For the foregoing reasons, we affirm all convictions and sentences.

AFFIRMED

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
FAYETTEVILLE DIVISION

NO. 89-36-01-CR-3

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	ORDER
JONATHAN LOWRY,	)	
Defendant.	)	

This matter is before the court on defendant Jonathan Lowry's motion for judgment of acquittal, or in the alternative, motion for a new trial pursuant to Fed. R. Crim. P. 29 and 33, respectively. On April 9, 1990, a jury convicted defendant of all five counts of an indictment, which charged defendant with engaging in a continuing criminal enterprise in violation of 21 U.S.C. § 848; conspiracy to possess

APPENDIX "D"

with intent to distribute a controlled substance; distribution of a controlled substance; interstate travel in aid of racketeering; and money laundering.

Defendant sets forth the following claims which he contends entitle him to a judgment of acquittal or a new trial: (1) the trial court erred when it denied defendant's pre-trial motion to dismiss based ont he failure of the indictment to identify the five or more persons whom the grand jury relied on in returning the continuing criminal enterprise ("CCE") indictment against defendant; (2) the trial court erred by failing to instruct the jury that they were required to reach unanimous agreement on the three acts constituting the continuing series of narcotics violations committed by defendant as required for a CCE charge; (3) the jury's verdict that certain persons were "involved" in the continuing criminal enterprise indicates that the jury

was not unanimous in its determination as to the identity of the five or more people whom defendant supervised for conviction of the CCE charge; (4) the trial court erred when it allowed the government to put defendant's character in issue by eliciting from co-defendant Donald Lowry testimony that defendant had a reputation from being a drug dealer; (5) the trial court erred in overruling the defense objection to, and in refusing to strike, testimony volunteered by government witness Brady Locklear that he had passed a lie detector test; (6) the evidence was insufficient as a matter of law to support the guilty verdicts on any of the various counts; and (7) there was no support in the record for the jury's determination that defendant carried on the conspiracy after November 1, 1987.

CLAIMS REGARDING THE CCE CHARGE

In his motion for judgment of acquittal, or in

the alternative, motion for a new trial, defendant primarily concentrates on alleged procedural errors in connection with the CCE charge. First, defendant argues that the trial court erred by denying defendant's pre-trial motion to dismiss based on the failure of the indictment to set forth the names of the five persons supervised or managed by defendant in connection with the CCE charge. A review of the case law in this circuit reveals defendant's contention to be without merit. In United States v. Amend, 791 F.2d 1120, 1125 (4th Cir. 1986, the Fourth Circuit Court of Appeals considered this same issue and held that it is sufficient in a continuing enterprise charge if the indictment tracks the statute. See also, United States v. Lurz, 66 F.2d 69, 78 (4th Cir. 1981), cert. denied, 455 U.S. 1005, 102 S. Ct. 1642, 71 L.Ed.2d 874 (1982).

In the case at bar, count one of defendant's indictment charged that defendant:

> did knowingly, intentionally, and unlawfully engage in a continuing criminal enterprise in that Jonathan Lowry: 1. Did knowingly, intentionally, and unlawfully violate a provision of Sub-Chapter I of the Drug Abuse Control Act of 1970 (Title 21, United States Code, Section 801 et seq), which was part of a continuing series of violations of Sub-Chapter I of the Drug Abuse Control Act of 1970 relating to: Possession with the intent to distribute and distribution of cocaine, a Schedule II narcotic controlled substance and marijuana, a Schedule I non-narcotic controlled substance, in violation of the provisions of Title 21, United States Code, Section 841(a)(1); 2. Did undertake such series of violations in concert with five or more persons with respect to whom Jonathan Lowry did occupy a position of organizer, a supervisory position, and other position of management; and 3. Did obtain substantial income and resources from such series of violations. ...

This count clearly tracks the statute.[1] Furthermore, in a letter dated October 18, 1989, in response to defendant's request for particulars, the government listed persons whom Jonathan Lowry had supervised. Accordingly, defendant suffered no prejudice from any alleged lack of specificity in this regard. Defendant's motions for judgment of acquittal or for a new trial on the grounds that the indictment did not specify the five persons supervised or managed by defendant are therefore denied.

[1] Title 21 U.S.C. §848(c) states: For the purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if -- (1) he violates any provision of this subchapter of subchapter II of this chapter the punishment for which is a felony, and (2) such violation is a part of a continuing series of violations of this subchapter of subchapter II of this chapter -- (A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or nay other position of management, and (B) from which such person obtains substantial income or resources.

Defendant next argues that the jury's determination that certain persons were "involved" in the charged criminal enterprise does not measure up to the required finding beyond a reasonable doubt that the jury be unanimous as to the identity of the five or more persons whom the defendant acted in concert with in committing the three drug offenses required to satisfy 21 U.S.C. §848. This contention is also without merit and must be dismissed.

As stated by the court in United States v. Alvarez, 860 F.2d 801, 817 (7th Cir. 1988), it is not necessary for the government to establish in every CCE case the specific identity of all five individuals subject to the defendant's direction. Often, the government will be able to show that an individual's place in the hierarchy or structure of the organization established his direction of five or more people. Id. However,

when the government chooses to rely on the activity of specific individuals, it must submit sufficient evidence to permit a rational jury to conclude that each of those individuals had bee directed by the defendant. Id.

In the case sub judice, the government showed both that defendant's position in the hierarchy was such to infer supervision and also presented sufficient evidence of defendant's supervision and control of specific individuals. Furthermore, the jury was instructed by the court that it had to be unanimous as to whom defendant supervised, managed, or organized. In accordance with the court's instructions, the jury submitted a list of persons whom it found were so involved with Lowry. The mere fact that the jury listed these persons as being "involved" with defendant having been the supervisor or organizer of these persons.

Defendant next contends that the trial court erred by failing to instruct the jury that they were required to reach unanimous agreement on the three predicate acts constituting the continuing series of narcotic violations committed by the defendant in order to convict on the CCE charge. However, in the case at bar, the court clearly instructed the jury that they had to find at least three predicate offenses in order to convict on the CCE charge and that they must reach nay verdict unanimously. There is no requirement that there be a special verdict as to the predicate offenses. United States v. Rosenthal, 793 F.2d 1214 (11th Cir. 1986).

Furthermore, defendant had ample notice of the evidence against him through discovery material, the government's letters, and Jencks' Act material. Accordingly, defendant's motions for judgment of

acquittal or for a new trial on the grounds that the court should have specifically instructed the jury to reach unanimous agreement as to the three predicate offenses are denied.

Defendant next argues that he could not have been convicted of the CCE charge because the five or more persons listed by the jury as being supervised or controlled by defendant were either "mere purchasers", or as co-conspirators, defendant's distributions were in actuality distributions to himself. While the courts have held that a person who purchases drugs without doing more, such as an ultimate user of the drugs, may not be convicted for being part of the conspiracy, where the evidence shows that such persons have taken actions to further the aims of the conspiracy, such as reselling the drugs, the evidence is sufficient to convict them as conspirators. United States v. Grunsfeld, 558

F.2d 1231, 1235 (6th Cir. 1977). In the present case, the evidence was overwhelming that the persons found by the jury to have been supervised by defendant were more than mere purchasers. The evidence showed that such persons furthered the aims of the conspiracy, such as by reselling the drugs. These persons were part of the conspiracy and were supervised by the defendant.

While the actions of one conspirator may be attributed to all members of the conspiracy, United States v. Pinkerton 328 U.S. 640, 647, 66 S.Ct. 1180, 90 L.Ed.2d 1489 (1946), it is circular reasoning to argue that defendant distributed to himself when he provided drugs to other members of the conspiracy of redistribution. The actions of the co-conspirators who were supervised by defendant make up part of the continuing series of violations for CCE. United States v. Davis, 809 F.2d 1194, 1203-04 (6th Cir. 1987).

Accordingly, defendant's motions for judgment of acquittal or for a new trial on the grounds that defendant's distributions were to mere purchases, or to co-conspirators and thus to himself, are denied.

CLAIM REGARDING REPUTATION TESTIMONY

Defendant next contends that the trial court erred when it allowed the government to put defendant's character in issue. Specifically, defendant argues that it was error to allow testimony elicited by the government from defendant Donald Lowry, Jonathan Lowry's brother, that defendant had a reputation for being a drug dealer. This claim is also without merit and must be dismissed.

It is well-established that evidence of other crimes, wrongs, or acts is not admissible to prove character as a basis for suggesting the inference that conduct on a particular occasion was in conformity

with such character. However, the evidence may be offered for another purpose, such as proof of motive, opportunity, knowledge, or preparation. Fed. R. Evid. 404(b). See also United States v. Watford, 894 F.2d 665, 671 (4th Cir. 1990). In the case at bar, testimony that defendant Jonathan Lowry had a reputation for being a dealer was not admissible to show that conduct on a particular occasion was in conformity with such reputation; however, such testimony was admissible pursuant to Fed. R. Evid. 404 (b) to show defendant Donald Lowry's knowledge and participation in the conspiracy. Therefore, testimony of defendant's reputation in the community was property admitted during the trial of the present case, and this claim is dismissed.

CLAIM REGARDING INSUFFICIENCY OF THE EVIDENCE

Defendant next contends that the evidence was

insufficient as a matter of law to support guilty verdicts on any of the various counts. Defendant further r argues that there was no evidence to support the jury's findings that defendant had conspired with anyone after November 1, 1987. This court finds that the evidence as to defendant's guilt on all five counts was overwhelming and compelling.

As to defendant's claim concerning the jury's determination that defendant had conspired after November 1, 1987, the government established the existence of the conspiracy in which defendant was involved and that the conspiracy did not terminate until after November 1, 1987. Furthermore, the burden was on defendant to show that he withdrew from the conspiracy by affirmative action, United States v. Urbanik, 801 F.2d 692, 697 (4th cir. 1986), yet defendant offered no evidence that he had withdrawn

from the conspiracy. Defendant's claim as to the sufficiency of the evidence is thus dismissed.

CLAIM REGARDING TESTIMONY AS TO A POLYGRAPH TEST

Lastly, defendant argues that the trial court erred in overruling the defense objection to, and in refusing to strike testimony volunteered[2] by witness Brady Locklear that he had passed a lie detector test. This court finds that even if the admission of such testimony amounted to error, such error was harmless error in light of the overwhelming and compelling evidence as to defendant's guilt on all counts. Defendant's claim regarding testimony as to a polygraph test is therefore dismissed.

[2] Brady Locklear's testimony that he passed a lie detector test was not in response to any question before the witness.

CONCLUSION

For the above-stated reasons, defendant's motions for judgment of acquittal, or in the alternative for a new trial, are DENIED.

This the 6th day of June, 1990.

MALCOLM J. HOWARD
United States District Judge

At Greenville, NC
#21